88-1613

Supreme Court, U.S.
FILED
APR 3 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

BRIAN W. DOWLING,

Petitioner,

V.

ALABAMA STATE BAR,

Respondent.

ON APPEAL FROM THE
SUPREME COURT OF ALABAMA

PETITION FOR WRIT OF CERTIORARI

I. Harry Lyon
P.O. Box 21
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ATTORNEY FOR PETITIONER

April 3, 1989

53 pp

QUESTIONS PRESENTED FOR REVIEW

I. Are Petitioner's First Amendment Freedom of Speech rights violated upon being subjected to sanctions imposed by Respondent, Alabama State Bar, regarding pure political speech in a campaign for judicial office?

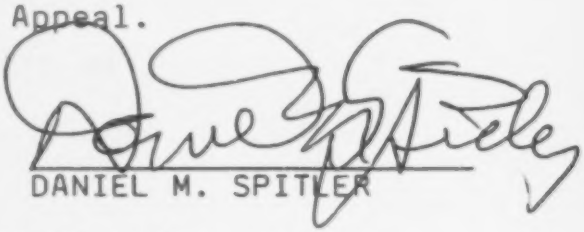
II. Does the Respondent, Alabama State Bar, have jurisdiction to sanction Petitioner?

III. Are the Disciplinary Rules of the Alabama Code of Professional Responsibility, specifically DR-2-101(A) and DR-1-102(A)(4), unconstitutionally vague or overbroad when applied to Petitioner relating to his pure political speech in a campaign for public office? (See Appendix I for said Disciplinary Rules, pages 10-11)

IV. Was sufficient evidence presented in the Disciplinary Hearing to withstand a denial of Petitioner's timely Motion for JNOV?

AFFIDAVIT

I, Daniel M. Spitler, as a member of the Bar of this Court, do hereby swear that Harry Lyon did deposit in the United States Mail the Writ of Certiorari captioned Brian W. Dowling v. Alabama State Bar. Furthermore, that this mailing took place on April 3, 1989, which is within the permitted time for filing this Appeal.



DANIEL M. SPITLER

SWORN and SUBSCRIBED before me this 3rd day of April, 1989.

NOTARY PUBLIC

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PARTIES TO THIS PROCEEDING

The caption of the case contains the names of all the parties to this proceeding.

OPINION BELOW

Reference is made to the opinion of the Alabama Supreme Court which was split six (6) to two (2) with one abstension, a copy of which is attatched hereto. (See Appendix I)

JURISDICTION

Jurisdiction is invoked under the Freedom of Speech clause of the First Amendment of the United States Constitution as made applicable to the States under the Fourteenth Amendment to the United States Constitution.

The date of judgment sought to be reviewed is September 23, 1988. The same date also is the date of entry of this judgment subject to Petitioner's Application for Rehearing which was overruled on January 13, 1989.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

i) The First Amendment to the Constitution of the United States, which provides:

> Congress shall make no law representing an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people peaceably to assemble, and to perform the Government for a redress of grievances.

ii) The Fourteenth Amendment to the Constitution of the United States, which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

iii) Disciplinary Rules 2-101(A) and 1-102(A)(4) of the Code of Professional Responsibility of the Alabama State Bar as adopted May 6, 1974, and as amended thereafter. (See Appendix I, pages 10-11)

STATEMENT OF THE CASE

Petitioner, an attorney in private practice, was a candidate for the office of District Judge in Houston County, Alabama in 1986. As part of his campaign, Petitioner had a card printed using the slogan "JUDGE BRIAN DOWLING FOR DISTRICT JUDGE", his idea being that those people who saw the card would be judging him for the position of Judge when they went to the polls on election day. Petitioner gave out a few cards to some people he personally knew. On May 27, 1986 one of these cards and an anonymous note was sent to the Alabama Judicial Inquiry Commission with an unsigned typewritten note attatched thereto which stated "this man is not, and has never been a judge", said allegation

being true. On the reverse side of said campaign card listed ten (10) qualifications Petitioner was asking those who received the card to "JUDGE" him. The Chairman of the Judicial Inquiry Commission sent a letter and the anonymous note and card to the Chief Justice of the Alabama Supreme Court informing the Chief Justice as follows: "enclosed is an anonymous note and card of Brian Dowling which the Commission deems to be within the jurisdiction of the Supreme Court of Alabama". The Chief Justice then gave the anonymous note and card to the Clerk of the Supreme Court with the comment "take care of it". The Clerk then submitted the note and card to the General Counsel of the Alabama State Bar.

On July 31, 1987, the General Counsel for the Alabama State Bar filed a complaint in the office of the Secretary of the Bar alleging that Petitioner had violated several Disciplinary Rules of the Code of Professional Responsibility.

Subsequently, the Board of Bar Commissioners of the Alabama State Bar found Petitioner guilty of both charges brought against him and fixed as his punishment a Public Censure. The Petitioner appealed their decision to the Alabama Supreme Court.

On September 23, 1988 the Alabama Supreme Court, in a 6-2 decision, affirmed the finding of the Board of Bar Commissioners of the Alabama State Bar. Justices Maddox and Houston submitted a dissenting opinion on the question of jurisdiction. (See Appendix I)

The Petitioner first raised the First Amendment Constitutional question and jurisdiction issue in his Answer to the Bar's original complaint. (See Appendix 2) Petitioner also raised the First Amendment question and the failure of the Board of Bar Commissioners to grant his JNOV motion in his brief to the Alabama Supreme Court.

REASONS FOR GRANTING THE WRIT

This is a case of "FIRST IMPRESSION" before this Honorable Court and if it is not considered and reversed, the precedent that has been established by the Alabama Supreme Court will create a "chilling effect" on attorney candidates for public office, particularly Republican candidates in that all of Alabama's Appellate Court Justices, as well as almost all lower court Judges and members of the Board of Bar Commissioners and Alabama Bar Association are active Democrats or politically lean toward that Party.

In the case of Brown v. Hartlage, 456 U.S. 52 (1982) the Supreme Court held, to wit:

> States seeking to regulate elections and campaign speech and plaintiffs seeking damages for defamatory speech are both confronted with the broad protection that the First Amendment gives to speech in public matters.

This Court, in Brown, supra, went on to state, to wit:

> Although the state interest in protecting the political process from distortions caused by untrue and inaccurate speech is somewhat different from the state interest in protecting individuals from defamatory falsehoods, the principles underlying the First Amendment remain paramount...'[W]e depend for correction not on the conscience of judges and juries but on the competition of other IDEAS' (emphasis added), Gertz v. Robert Welch, Inc., 418 U.S. 339-340 (1974)...

Even if Petitioner had distributed his campaign cards to those who did not know him and they misinterpreted the card to believe that he was or had been a Judge, the Supreme Court in Brown, at 1533, supra, provides the adequate remedy in such situations where it was held, to wit:

> In a political campaign, a candidate's factual blunder is unlikely to escape the notice of and correction by, the erring candidate's opponent. The preferred First Amendment remedy of 'more speech not enforced silence' thus has special force; (also relied on in Pestrak v. Ohio Elections Commission, 670 F. Supp. 1368 (S.D. Ohio 1987).

Furthermore, as DR 2-101(A) and DR 1-102(A)(4) do not specifically address campaign advertising (the former DR spec-

ifically relates to lawyer commercial advertising) they are both unconstitutionally vague when applied to Petitioner. Clear guidelines must exist regarding what is illegal so that persons will not be chilled in the exercise of their fundamental First Amendment Rights for fear that they will be prosecuted. NAACP v Button, 371 U.S. 415 (1963). In NAACP, supra, the Supreme Court set out the criteria the State must meet in order to justify any encroachment upon Petitioner's First Amendment Rights, when it held, to wit:

> The state must have more than a rational or legitimate interest, rather it must justify any encroachment upon First Amendment Rights with a compelling interest. The Court must then analyze whether the state has chosen the least intrusive means to do so keeping in mind that "precision of regulation must be the touchstone" in an area so closely encroaching upon our precious freedoms. 371 U.S. at 438.

Statutes that apply to "pure speech" such as a regulatory scheme are subject to strict scrutiny. Broadrick v Oklahoma,

CERTIFICATE OF SERVICE

I hereby certify that I have served three (3) copies of the foregoing Writ of Certiorari upon the Honorable Robert W. Norris, General Counsel for the Alabama Bar Association, Center For Professional Responsibility, 1019 South Perry Street, Montgomery, Alabama 36104, by placing said copies in the United States Mail, first class postage prepaid this 3rd day of April, 1989.

I. HARRY LYON
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Petitioner
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A P P E N D I X

I. Opinion of the Alabama Supreme Court in Brian W. Dowling v Alabama State Bar. SC No. 87-228. Pages 1-31.

II. Answer of Brian W. Dowling to Complaint of Alabama State Bar. Pages 32-35.

III. Notice of Application for Rehearing, dated January 13, 1989, being overruled. Page 36.

APPENDIX I

THE STATE OF ALABAMA----JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

SPECIAL TERM, 1988

87-228

Brian W. Dowling

v.

Alabama State Bar

Appeal from the Board of Disciplinary Enforcement of the Alabama State Bar

PER CURIAM.

This case involves an action brought by the Alabama State Bar against the Appellant, Brian Dowling, alleging failure to comply with DR 2-101(A) and DR 1-102(A)(4) of the Alabama Code of Professional Responsibility. The case was heard on October 16, 1987, and the Disciplinary Board found appellant guilty of both charges and held the appropriate discipline to be a public censure. The Board denied appellant's motions for directed verdict at the close of the Bar's case and at the close of all the evidence, and denied his motion for JNOV or new trial.

Appellant was a practicing attorney in Dothan at the time this action arose, and he was a Republican candidate for Houston County district judge in the 1986 election. As part of his campaign, appellant had printed several cards reading "Judge Brian Dowling for District Judge, Houston County." Appellant, admittedly, is not, and has never been, a judge.

Appellant marked several of these cards with the notation "November 4th" and placed them on his secretary's desk so that visitors to his office might take them. On May 27, 1986, a substantially similar card was mailed to the Judicial Inquiry Commission with the anonymous complaint that Dowling was not, and had never been, a judge. The complaint was forwarded to the Alabama State Bar.

The Bar's case against appellant under the Disciplinary Rules cited above consisted of the card and the anonymous letter, together with the testimony of the clerk of the Supreme Court and other exhibits showing the path these items had followed from the Judicial Inquiry Commission to the Alabama State Bar.

Appellant answered the complaint as follows:

(1) the copy of the card attached to the Bar's complaint was not a "true copy";

(2) he never delivered a misleading card to anyone;

(3) no one was ever misled by any such card;

(4) no proof existed that the cards were misleading; and

(5) the cards are not in any way improper or misleading, especially when they "clearly" indicated on the reverse

side that appellant was not, and never had been, a judge.

Appellant testified that he meant to use the word "judge" as a verb, asking the voters to "judge" him to be the best candidate based on his credentials listed on the reverse side of the card. He further testified that no one could have been misled by the cards because "everybody" in Dothan knew he was a lawyer and not a judge, although he conceded that, taken "out of context", the cards could be misleading. Appellant added that he thought his prosecution was a politically motivated attempt by Houston County Democrats, to whom he referred as "the old Wallace crowd," to discredit and destroy his campaign.

The Disciplinary Board found appellant guilty of the violations charged. He appeals from the denial of his motion for directed verdict at the close of the Bar's

case and the denial of his motion for JNOV. The appellant asserts three bases for overturning the Disciplinary Board's decision, which are all addressed individually below.

I. The Appellant argues that the Disciplinary Board erred in denying his motion for directed verdict or his motion for JNOV because, he says, sufficient evidence was not presented.

A charge brought against an attorney in a disciplinary proceeding must be proved by clear and convincing evidence. Jackson v. Alabama State Bar, 462 So. 2d 365 (Ala. 1985). The appellant contends that the charges brought against him were not proved by clear and convincing evidence. However, Dowling did not deny the essential factual allegations that were specified in the disciplinary charges against him. The complaint contained essentially the following allegations:

1. That the appellant was a licensed

practicing attorney at all pertinent times;

2. that the appellant was a candidate for district judge;

3. that as part of his campaign, the appellant had printed and distributed a certain campaign card, a copy of which was attached to the complaint; that the card read, in big letters on the front of the card, "Judge Brian Dowling for District Judge";

4. that the appellant has never been a judge in any judicial system;

5. that in doing the above described acts the appellant made a false or misleading communication about himself, thereby violating DR 2-101(A) and DR 1-102(A)(4).

The appellant denied in his answer ever delivering a misleading card to anyone, but when he testified before the Bar he admitted that he had distributed the campaign card. He claimed in his answer that the copy of the card attached to the complaint was not a true copy of the card at issue. he did not specify how the copy attached to the complaint was different from the card at issue. It is apparent from the hearing that the only

difference the appellant claims is that "November 4th" was not handwritten on the card.

Therefore, we must conclude that the charge that the appellant was guilty of a misrepresentation was proved by clear and convincing evidence, based on the following facts: 1) the substantive charges were not denied, and were, therefore, admitted (Rule 8(d), A.R. Civ.P.); 2) Dowling testified that he approved the final design of the cards; 3) he admitted that the cards could be misleading; and 4) he admitted that he had distributed the cards before he wrote the Bar on July 7, 1988.

II. The Appellant argues that DR 2-101(A) and DR 1-102(A)(4) are so vague or overbroad as to violate the First Amendment to the United States Constitution when applied to him in this case.

In First Amendment cases, an overbroad statute or rule is one that is designed to

burden or punish activities that are not constitutionally protected, but which also includes within its scope activities that are protected by the First Amendment. 3 Rotunda, Nowak, Young, Treatise on constitutional Law Substance and Procedure, § 20.8 (1986); NAACP v. Button, 371 U.S. 415, 432 (1963). However, the overbreadth of a statute or rule must be not only real, but substantial as well, judged in relationship to the statute or rule's plainly legitimate sweep. Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

A statute or rule is void for vagueness when its prohibition is so vague as to include protected speech or as to leave an individual without knowledge as to the nature of speech that is prohibited. See Kolender v. Lawson, 461 U.S. 352 (1983); NAACP v. Button, 371 U.S. 415, 432, 433 (1963); 3 Rotunda, Nowak, young, Treatise on Constitutional Law Substance and Procedure,§ 20.9 (1986). Clear guidlines must

exist regarding what is illegal, so that there will be no "chilling" effect on the exercise of free speech. NAACP v. Button, 371 U.S. 415 (1963).

While the First Amendment guarantees the right to free speech, government is not prevented from proscribing certain speech. To be precise, demonstrable falsehoods are not protected by the First Amendment in the same manner as truthful statements. Brown v. Hartlage, 456 U.S. 45, 60 (1982); Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974). In Vanasco v. Schwartz, 401 F. Supp. 87, 91-92 (S.D.N.Y. 1975) the federal district court, tracking the language of the Supreme Court, held:

> "'That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which are "no essential part of any exposition of ideas, and

> are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed..."Chaplinsky v. New Hampshire, 315 U.S. 568, 572, [62 S. Ct. 766, 86 L.Ed. 1031]. Hence the knowing false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.'"

Vanasco v. Schwartz, 401 F.Supp. 87, 91-92 (S.D.N.Y. 1975), quoting Garrison v. Louisiana, 379 U.S. 64, 75 (1964). Therefore, even speech made in a political context may be prohibited. However, "laws regulating campaign advertisements must aim specifically at evils within the allowable area of governmental control...and not sweep within their ambit other activities that constitute an exercise of protected rights." Thornhill v. Alabama,310 U.S. 88 (1940).

The language of DR 2-101(A) and DR-1-102(A)(4) is clear:

> "A lawyer shall not make or cause to be made a false or misleading communication about the lawyer or the lawyer's services. a communication is false or misleading if it:
>
> "(A) Contains a material misrepresen-

tation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading...."

DR-102

"(A) "A lawyer shall not:

"....."

"(4) Engage is conduct involving dishonesty, fraud, deceit, or misrepresentation, nor be guilty of willful misconduct."

DR 2-101(A) is clear in its meaning that misrepresentations are prohibited by a lawyer where they involve the lawyer or his services. However, misrepresentations made by a lawyer in a political context must be shown to have been made with knowledge of their falsity or with reckless disregard of the truth. Cf. New York Times v. Sullivan, 376 U.S. 254 (1963); Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974). Otherwise, there would be a danger of chilling the exercise of protected speech, because while an erroneous statement is not worthy of constitutional protection, it is nevertheless

inevitable in free debate. Gertz, 418 U.S. at 340. An innocent mistatement will not be grounds for punishment.

We construe DR 2-101(A), as it relates to restricting an attorney's speech in a political context, to be limited to misrepresentations that are made with knowledge of their falsity or with reckless disregard of the truth. Also, we construe DR 1-102 (A)(4), as it relates to restricting an attorney's speech in a political context, to be limited in exactly the same way as DR 2-101(A). In the present case the appellant obviously knew that he was not a judge. Dowling admitted that the statement could mislead a person and cause him to believe that Dowling was a judge. The evidence that the appellant intentionally made the statement, and his admission that he was aware of the fact that it could be misleading, support the conclusion that he made the statement with an intent to deceive. Cf. Myers v. Baker, 24 Ala. App. 387, 135

So. 643 (1931) (one is presumed to intend that which he does); 31A C.J.S. Evidence §131 (1964).

Under the above analysis, these two Disciplinary Rules are not unconstitutionally vague or overbroad, because they are drawn and interpreted so narrowly that they do not sweep within their ambit protected speech; furthermore, they are written precisely enough that the appellant knew, or should have known, that his conduct was prohibited. See Buckley v. Valeo, 424 U.S. 1 (1976) (a criminal statute is not unconstitutionally vague if persons of ordinary intelligence can determine exactly what acts are prohibited). Rule 2(a), Alabama Rules of Disciplinary Enforcement, provides:

> "Acts or omissions by an attorney, individually or in concert with any other person or persons, which violate the Attorney's Oath of Office or Code of Professional Responsibility of the Alabama State Bar as from time to time shall be in effect in the State of Alabama, shall constitute misconduct and shall be grounds for discipline, whether or not the act or omission occurred in the course of an attorney-client relationship."

See also Ex Parte Montgomery, 224 Ala. 91, 12 So. 2d 314 (1943). Therefore, the appellant should also have known that his conduct was prohibited even though it did not necessarily involve the practice of law.

III. The appellant argues that DR 2-101(A) and DR 1-102(A)(4) amount to a prior administrative restraint of constitutionally protected speech.

There is no prior administrative restraint in the present case. The appellant cites Vanasco v. Schwartz, 401 F.Supp. 87, 91-92 (S.D.N.Y. 1975), and Pestrak v. Ohio Elections Comm'n, 670 F.Supp. 1368 (S.D. Ohio 1987), for the proposition that DR 2-101(A) and DR 1-102(A)(4) are unconstitutional prior restraints on speech. However, those cases can be distringuished from the present case.

As to prior restraint, the Vanasco and Pestrak courts held that when speech is reviewed by an administrative agency that imposes restraints upon the exercise of speech and does so by use of a standard of proof

less than a "clear and convincing evidence" standard and there is not provision for prompt judicial review, then this type of administrative hearing amounts to an unconstitutional prior restraint. Vanasco v. Schwartz, 401 F.Supp. at 99; Pestrak v. Ohio Elections Comm'n, 670 F.Supp. at 1376. Those cases were not traditional "prior restraint" cases. In each case, the speech had already occurred, whereas in a traditional prior restraint case the speech is prohibited before it is ever spoken. See e.g., Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975). The reason it was considered prior restraint was because the plaintiffs in Vanasco and Pestrak were prevented from making any further statements, on the basis of an administrative hearing that did not require clear and convincing evidence. The implication in the opinions is that there would have been no prior restraint had there been adequate standards of proof, along with provision for adequate judicial review.

The Alabama Rules of Disciplinary Procedure provide for adequate judicial review. First, the present case is similar to Pestrak and Vanasco, because there is no traditional form of prior restraint here. There was administrative action taken after speech in question occurred. However, the difference between the present case and the Pestrak and Vanasco cases is that 1) in this case clear and convincing proof was required and 2) in this action there was provision for adequate judicial review. No action may be taken against an attorney based on the findings of the administrative hearing if the attorney chooses to appeal the case to this Court. Alabama Rules of Disciplinary Procedure 18(g). Therefore, the two disciplinary rules enforced in this case do not amount to prior restraint.

In summary: 1) The petitioner was found to have been guilty of a misrepresentation,

by clear and convincing evidence; 2) the two Disciplinary Rules, under our construction, are not unconstitutionally vague or overbroad; 3) there was no prior restraint; and 4) there was clear and convincing evidence that the appellant made the misrepresentation with actual knowledge of its falsity.

AFFIRMED.

Torbert, C.J., and Jones, Almon, Shores, and Beatty, JJ., concur.

Maddox and Houston, JJ., dissent.

Adams, J., recused.

87-228

Brain W. Dowling v. Alabama State Bar

MADDOX, JUSTICE (Dissenting).

This case presents a very interesting question: Can the Alabama State Bar discipline a lawyer, who is a candidate for a judgeship, for making a misrepresentation on his campaign material? I do not believe that the State Bar had the authority to try this case; therefore, I must respectfully dissent.

I believe that all candidates for judgeships, including incumbent judges, are subject to the Canons of Judicial Ethics, and that jurisdiction to try breaches by a candidate of any provisions of the Canons is in the Judicial Inquiry Commission and the Court of the Judiciary, or the Supreme Court of Alabama, depending upon whether the candidate is a judge or a lawyer, respectively.[1]

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[1]Dowling's motion for a directed verdict filed with the Disciplinary Commission

In my judgment, Canon 7, Canons of Judicial Ethics, is the sole method for disciplining Dowling under the facts of this case. Canon 7 reads as follows:

"A. Political conduct in general;

"(1) A judge or a candidate for election to a judicial office should endeavor at all times to refrain from political activities inappropriate to the judicial office that he holds or seeks. It is desirable that a judge or a candidate for election to judicial office endeavor not to be involved in the internal workings of political organizations, engage in campaign activities in connection with a political candidate other than candidates for judicial office and not be involved in political fund solicitations other than for himself. However, so long as judges are subject to nomination and election as candidates of a political party, it is realized that a judge or a candidate for election to a judicial office cannot divorce himself completely from political organizations and campaign activities which, indirectly or directly, may be involved in the internal workings or campaign activities of a political organization, it is imperative that he conduct himself in a manner at all times to prevent any political considerations, entanglements or influences from ever becoming involved in any judicial decision or in the judicial process.

---

[1](continued) of the Alabama State Bar, in my opinion, sufficiently raised the jurisdiction question.

"(2) A judge should resign his office he becomes a candidate either in a political primary or in a general election for a non-judicial office, except that he may continue to hold his judicial office while being a candidate for election to a state constitutional convention or commission.

"(3) A judge may engage in political activity on behalf of measures to improve the law, the legal system or the administration of justice.

"B. Campaign conduct:

"(1) A candidate, including an incumbent judge, for a judicial office that is filled either by public election between competing candidates or on the basis of a merit system election:

"(a) Should maintain the dignity appropriate to judicial office.

"(b) Should prohibit public officials or employees subject to his direction or control from doing for him what he is prohibited from doing under this canon.

"(c) Should not make pledges or promises of conduct in office other than the faithful and impartial performances of the duties of the office, should not announce in advance his conclusions of law on pending litigation; and should not misrepresent his identity, qualifications, present position or other fact.

"(d) Should not use or permit the use of campaign contributions for the private benefit of himself.

"C. A candidate for any judicial office not subject to the jurisdiction of the judicial inquiry commission or the court of the judiciary who breaches any applicable mandatory provision of these canons should be subject to the original jurisdiction of the supreme court of Alabama." (Emphasis added.)

While I agree that a lawyer disciplinary agency can be given jurisdiction over a lawyer for conduct that occurs during a campaign for a judgeship, Alabama has not seen fit to follow this procedure, but, in fact, has reserved to this Court the power to discipline "candidate[s] for any judicial office not subject to the jurisdiction of the judicial inquiry commission or the court of the judiciary." Canon 7C., Canons of Judicial Ethics.

It is interesting to note that, in this case, the record shows that the bar committee that first examined the complaint against Dowling was of the same opinion as I am. The "Report of Completed Investigation and Recommendation" of the Houston County Bar Association, where the complaint origin-

ated, was that the complaint be dismissed as not within its jurisdiction. The General Counsel of the Bar, however, in a memorandum to the Alabama State Bar Disciplinary Commission, stated that "[He saw] no reason why the Alabama State Bar [did] not have jurisdiction to discipline Brian W. Dowling if he [was] guilty of a violation of the Code of Professional Responsibility."

The General Counsel, in his brief to the Disciplinary Commission, was of the opinion that this Court's case of Alabama State Bar v. Moore, 282 Ala. 562, 213 So.2d 404 (1968), did not apply, with which I agree, but he concluded with the following statement, with which I do disagree:

> "Although the Alabama Canons of Judicial Ethics contains a statement concerning candidates for election to judicial office, the Canons do not state that the Alabama State Bar does not have judrisdiction to discipline a candidate for judicial office if he, indeed, has violated some provision of the Code of Professional Responsibility of the Alabama State [Bar]. As a matter of

fact, by letter dated June 3, 1986, to the Honorable C. C. Torbert, Chief Justice, the Chairman of the Judicial Inquiry Commission, Kenneth F. Ingram, stated that the Judicial Inquiry Commission had denied jurisdiction and had stated that the jurisdiciton of the Supreme Court would apply, and of course, the local grievance committees and the Disciplinary Commission act as [an] arm of the Supreme Court.

"By disciplining Brian W. Dowling by any type of the defined disciplines would in no way remove him from office nor would it remove him as a candidate for a judicial office although any type of public discipline would perhaps adversely reflect upon his candidacy.[2]

"In conclusion, I do not understand the rationale of the Houston County Grievance Committee in denying jurisdiction. Canon 7A.(1) contains the following:

"* * * *

"Although this Canon may vest the Judicial Inquiry Commission, [or] the Court of the Judiciary [with authority to] take action against the candidate for judicial office for certain pro-

---

[2]I totally disagree with this legal conclusion by the learned General Counsel. If Dowling's license was lifted, he could not become a judge.

> hibited activities, I do not view the Canon as divesting the Alabama State Bar of jurisdiction over a candidate for judicial office if he has, in fact, violated some provision of the Code of Professional Responsibility of the Alabama State Bar."

The problem with the General Counsel's conclusion is that this Court has not granted to the Bar the power to hear cases involving violations of the Canons of Judicial Ethics. I agree that a lawyer could be guilty of violating some disciplinary rule, and if he could no longer practice law, he could not be a candidate for a judgeship because judges "shall be licensed to practice law." Amendment 328, § 6.07, Constitution of Alabama, 1901.

Although we have no Alabama cases construing our Canons of Judicial Ethics on the question presented, I am of the opinion that the Judicial Inquiry Commission and the Court of the Judiciary have jurisdiction of complaints against incumbant judges who are candidates for a judgeship and that this

Court has jurisdiction of candidates who are "not subject to the jurisdiction of the judicial inquiry commission or the court of the judiciary." Canon 7C.

My research has turned up only two cases from other states in which a lawyer was disciplined for conduct that occurred while he was a candidate for judicial office. In each case, the Canons of Judicial Ethics were applied. In one case, the lawyer was tried in an original proceeding before the Kansas Supreme Court, and in the other he was tried by teh state disciplinary commission, because that state had a specific provision in its Code of Professional Responsibility that authorized the disciplinary commission to proceed against the lawyer/candidate. We have no such rule.[3]

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[3]When the oral arguments were heard on the adoption of Canon 7 by this court in 1975, Robert F. Leflar suggested the need for a disciplinary rule to cover lawyer/candidates. We never adopted one.

In In re Baker, 218 Kan. 209, 542 P. 2d 701 (1975), the Supreme Court of Kansas, in an original proceeding, held that certain pledges that the candidate would be a full-time judge, would work hard to earn his pay, would pay prompt attention to the people's business and would be considerate of the time of jurors and litigants, were within the purview of the Code of Judicial Conduct of that state, which prohibited a candidate for judicial office from making pledges or promises of conduct in office other than the faithful performance of the duties of that office.

In Baker, the Supreme Court of Kansas had original jurisdiction of the proceeding pursuant to a provision of the Kansas Constitution, but had, by rule, created a Commission on Judicial Qualifications to assist it in carrying out its constitutional resonsibilities. Canon 7 of the Kansas Code of Judicial Conduct was substantially similar to our own. It provided, in part:

"B. Campaign Conduct.

"(1) A candidate....for a judicial office that is filled by public election between competing candidates or on the basis of a merit system election:

"(a) should maintain the dignity appropriate to judicial office...;

"(b) should prohibit public officials or employees subject to his direction or control from doing for him what he is prohibited from doing under this Canon; and except to the extent authorized under subsection B(2) or B(3), he should not allow any other person to do for him what he is prohibited from doing under this Canon;

"(c) should not make pledges or promise of conduct in office other than the faithful and impartial performance of the duties of the office; or mispresent [sic] his identity, qualifications, present position, or other fact; or announce his views on disputed legal or political issues, except that he may answer allegations directed against his record in office."

As stated earlier, this Court has not adopted a Rule that grants to the Alabama State Bar the authority to assist this Court with complaints involving candidates who are "not subject to the jurisdiction of the judicial inquiry commission or the court of the judiciary," and, because of that fact,

I believe that if Dowling is to be disciplined for the conduct made the subject of this particular complaint, then the disciplinary proceeding is within the original jurisdiction of this Court, as Canon 7 specifically provides, not in the Alabama State Bar.

In Matter of Riley, 142 Ariz. 604, 691 P.2d 695 (1984), the other case my research revealed, a lawyer was disciplined by the state bar, even though he had won the election and was a superior judge at the time of the discipline, but in that case, unlike the Kansas case, the Disciplinary Rules of the Bar specifically provided, in DR 8-103, as follows:

> "(A) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of Canon 7 of the Code of Judicial Conduct."

As I have already pointed out, we have no similar provision in our Code of Professional Responsibility. Alabama's Canons of Judicial Ethics, of course, follow substantially the Code of Judicial Conduct of

the American Bar Association, but Canon 7 of that model code does not specify which court or body has jurisdiction of complaints against candidates for judicial office. Alabama's Canon 7 does. Alabama chose to vest jurisdiction as follows:

> "C. A candidate for any judicial office not subject to the jurisdiction of the judicial inquiry commission or the court of the judiciary who breaches any applicable mandatory provision of these canons shall be subject to the original jurisdiction of the supreme court of Alabama."

Canon 7C.

It is interesting to note that Bar Exhibit 1, "a note and a campaign card attached to an envelope addressed to the Judicial Inquiry Commission, "was sent to the Chief Justice of the Court by Judicial Inquiry Commission Chairman Kenneth F. Ingram, with a notation that it seemed to be within the jurisdiction of the Supreme Court. The Chief Justice forwarded the complaint to the Bar. I believe the matter should properly have been submitted to this

Court, which could have designated the Alabama State Bar to determine whether there was a breach of "any applicable mandatory provision" of the Canons of Judicial Ethics.

Since the adoption of Canon 7, this Court has not had an occassion to hear a complaint filed against a candidate for a judicial office, but I am of the opinion that this Court, under the provisions of Canon 7, is the body that has "original jurisdiction" of such complaints involving candidates "not subject to the jurisdiction of the judicial inquiry commission or the court of the judiciary." I recognize that there could be instances where a lawyer could be disciplined for misconduct in his professional or private capacity by the Alabama State Bar, and this could adversely affect his right to be a candidate for judicial office, but if the alleged misconduct is a violation of Canon 7, which governs candidates for judicial office, as this

alleged misconduct is, then Canon 7C. specifically applies. I must dissent.

APPENDIX II

BEFORE THE DISCIPLINARY BOARD OF THE

ALABAMA STATE BAR

IN THE MATTER OF)
)
BRIAN W. DOWLING) CASE NO. ASB-352
)
AN ATTORNEY AT LAW)

ANSWER

1. The complaint fails to state a claim upon which relief can be granted.

2. The Complaint shows on its face that any violation during a judicial campaign is beyond the authority of the Disciplinary Board of the Alabama State Bar.

3. Any alleged impropriety during a judicial campaign must be processed under the Canons of Judicial Ethics. Canon 7.

4. Respondent, a Republican, was deprived of a fair hearing before the Houston County Grievance Committee in that, with one possible exception, every member was an active Democrat or financial and political contributor of Respondent's Democrat opponent.

5. Respondent was never notified of

the ruling or recommendation of the Houston County Grievance Committee dated 2/12/87. All he received was a November 13, 1986 letter (Exhibit A) that the Disciplinary Commission "determined that the Complaint was not within their Jurisdiction".

6. Respondent was thereafter deprived of his constitutional rights to due process when- evidently - the complaint was sent back to the Houston County Grievance Committee who, without any notice or right to be heard given the Respondent, the Grievance Committee evidently was ordered by someone in Montgomery, Alabama to change its decision.

7. The Report of Completed Investigation signed by Edward Jackson 2/12/87 only alleges a violation of DR-2-101(A). This is Charge I of the Complaint. Therefore, Charge II of the formal complaint which alleges violation of DR-1-102(A)(4) must be dismissed.

8. The Final Report signed by the Chairman of the Disciplinary Commission on 3/30/87 was not based on any recommendation of

the General Counsel.

9. Respondent has never received any notice or hearing about a violation of DR-1-102(A)(4), only of DR-2-101(A). Please see the attached 4/16/87 letter from John A. Yung, IV, esq. (Exhibit B).

10. As a reading of the Ethical Consideration will make clear, Temporary DR-2-101 deals exclusively with a lawyer's misleading advertising. A campaign card for a judicial position is not covered.

11. A campaign card is outside the scope of Temporary DR-2-101, which is titled and deals with "Communication Concerning A Lawyer's Services".

12. There was no proof the slogan was "misleading".

13. Since the slogan was not misleading, Respondent Dowling is protected by the First Amendment to the United States Constitution.

14. There is nothing improper or misleading with the statement on the campaign card when read in full: "Judge Brian Dowling

For District Judge, Houston County."
especially (sic) when it is made clear on the reverse side of the card that Mr. Dowling is not and has never been a judge.

15. Respondent never delivered a misleading card to anyone.

16. No one was ever misled by any such card.

17. The formal charge attached to the Summons dated July 31, 1987 does not contain a true copy of the campaign card at issue.

18. Obviously, this anonymous complaint was made by an attorney/enemy of Respondent, not anyone who could have been or was misled by the card.

Brian Dowling
Respondent
134 South Oates St.
Dothan, AL 36301

APPENDIX III

OFFICE OF CLERK
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

Re: 87-228

BRIAN W. DOWLING VS. ALABAMA STATE BAR

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

XXXXXApplication for rehearing overruled. No opinion written on rehearing.

Torbert, CJ., Jones, Almon, Shores and Beatty, JJ., concur; Maddox and Houston JJ., dissent; Adams,J., recused

January 13, 1989.

Robert G. Esdale, Clerk
Supreme Court of Alabama

No. 88-1613

Supreme Court, U.S.
FILED
APR 26 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1989

BRIAN W. DOWLING,
Petitioner.

v.

ALABAMA STATE BAR,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF OF RESPONDENT ALABAMA STATE BAR IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN A. YUNG IV
FOR THE OFFICE OF GENERAL COUNSEL
ALABAMA STATE BAR
MONTGOMERY, AL 36104
(205) 269 -1514

ATTORNEY FOR RESPONDENT,
ALABAMA STATE BAR

QUESTIONS PRESENTED

I

WHETHER TEMPORARY DR 2-101(A) OF THE ALABAMA CODE OF PROFESSIONAL RESPONSIBILITY IS UNCONSTITUTIONALLY VAGUE OR OVERBROAD AS APPLIED TO PETITIONER DOWLING.

II

WHETHER DR 1-102(A)(4) OF THE ALABAMA CODE OF PROFESSIONAL RESPONSIBILITY IS UNCONSTITUTIONALLY VAGUE OR OVERBROAD AS APPLIED TO PETITIONER DOWLING.

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STATEMENT OF THE CASE

Two Disciplinary Rules contained in the Alabama Code of Professional Responsibility are involved in this case. They are attacked by petitioner Dowling as they were applied to him.

The first of the Disciplinary Rules involved is Temporary DR 2-101(A), which states:

> "A lawyer shall not make or cause to be made a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:
>
> (A) Contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading."

The second of the Disciplinary Rules involved in this case is DR 1-102(A)(4), which states:

"(A) A lawyer shall not:

* * *

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, nor be guilty of wilful misconduct."

Disciplinary charges were filed against petitioner Dowling before the Disciplinary Board of the Alabama State Bar on July 31, 1987. (Appendix at A1 - A4.)

The formal hearing before the Disciplinary Board was held on October 16, 1987, at the conclusion of which the Board found petitioner Dowling guilty of both charges specified in the disciplinary complaint, and ordered that he receive a Public Censure. (Appendix at A5.)

Thereafter, petitioner Dowling filed a "Motion for New Trial or to Alter, Amend, or Vacate the Judgment" along with a "Motion for JNOV," both of which were subsequently denied by the Disciplinary Board.

Dowling perfected an appeal to the Supreme Court of Alabama which affirmed the Disciplinary Board's findings and order on September 23, 1988. (Petitioner's App. at 1a - 31a.)

The Supreme Court of Alabama overruled petitioner Dowling's application for rehearing on January 13, 1989. (Petitioner's App. at 36a.)

The petitioner's Statement of the Case is erroneous in stating, at page 6 thereof, that petitioner Dowling was tried before and found guilty by the "Board of Bar Commissioners of the Alabama State Bar." The Board of Bar Commissioners is the governing body of the Alabama State Bar, and its duties do not include the trying of disciplinary charges against lawyers. Code of Alabama, (1975) §§34-3-40, 34-3-43.

Petitioner Dowling was actually tried before and found guilty by the Disciplinary Board of the Alabama State Bar, as provided

under Rule 4, Rules of Disciplinary Enforcement. Ala. Rep. 353-355 So.2d XXXIX.

ARGUMENT

Petitioner Dowling claims that the two Disciplinary Rules that he was found guilty of having violated are both unconstitutionally vague as applied to him.

A criminal statute is considered unconstitutionally vague if persons of ordinary intelligence cannot determine exactly what acts are made illegal. Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) and Erznozik v. City of Jacksonville, 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975). It is difficult to believe that any person of ordinary intelligence, let alone a trained, licensed, practicing lawyer, could not tell that both Temporary DR 2-101(A) and DR 1-102(A)(4) prohibited a lawyer from falsely representing to the public that he was a judge.

Temporary DR 2-101(A) is particularly clear and specific in prohibiting a lawyer from making "a false or misleading communication about the lawyer," and in defining a false or misleading communication as any that "contains a material misrepresentation of fact...or omits a fact necessary to make the statement considered as a whole not materially misleading." It is hard to imagine that more precise language could be constructed.

Only lawyers are qualified to hold the judgeship that Dowling sought, [1/] and he was attempting to sell himself to the voters by

---

[1/] Constitution of Alabama of 1901, Amed. No. 328, Sec. 6.07, provides:

> "Judges of the supreme court, courts of appeals, circuit court and district court shall be licensed to practice law in this state and have such other qualifications as the legislature may prescribe. Judges of the probate court shall have such qualifications as may be provided by law."

calculatedly misrepresenting that he already was or had been a judge.

Temporary Disciplinary Rule 2-101(A) was adopted verbatim from Rule 7.1(a) of the American Bar Association Model Rules of Professional Conduct. The American Bar Association adopted this language after years of study in connection with the preparation of its Model Rules of Professional Conduct.

Disciplinary Rule 1-102(A)(4) was based upon, and almost the same as, the corresponding DR 1-102(A)(4) of the older American Bar Association Model Code of Professional Responsibility. In Phelps v. Kansas Supreme Court, et al., 662 F.2d 649, 651 (10th Cir. 1981), the Court upheld the constitutionality of DR 1-102(A)(4) of the Kansas Code of Professional Responsibility, which was also based upon the ABA Model Code of Professional Responsibility, and the Court stated that the constitutional attack on the Rule "borders on the frivolous."

In Disciplinary Proceedings of Phelps, 637 F.2d 171, 175 (10th Cir. 1981), with reference to the same provisions of the Kansas Code of Professional Responsibility, including DR 1-102(A)(4), the Court stated that it was "not necessary that the Rules list each and every incidence in which a lawyer may possibly violate these Rules, and it is unnecessary that there must have been previous judicial construction of the Rules in order for governing legal precepts to exist."

Rule 2 of the Alabama Rules of Disciplinary Enforcement makes it perfectly clear that the Code of Professional Responsibility provides sanctions for lawyer misconduct that is outside of as well as that which is within activities normally associated with representing a client. Rule 2(a) of the Rules of Disciplinary Enforcement states:

> "Acts or omissions by an attorney, individually or in concert with any other person or persons, which violate the Attorney's Oath of Office or the Code of Professional Re-

> sponsibility of the Alabama State Bar as from time to time shall be in effect in the State of Alabama, shall constitute misconduct and shall be grounds for discipline, whether or not the act or omission occurred in the course of an attorney-client relationship." (Emphasis added.). Ala. Rep. 353-355 So.2d XXXVII.

Even before the Alabama Rules of Disciplinary Enforcement became effective in 1978, [2/] the Supreme Court of Alabama had held that lawyers could be disciplined for misconduct that was outside of and not connected with any professional employment as an attorney. Ex Parte Montgomery, 244 Ala. 91, 97, 12 So.2d 314, 318 (1943) and Ex Parte Grace, 244 Ala. 267, 13 So.2d 178 (1943). Petitioner Dowling clearly was on notice of the fact that the Bar had jurisdiction over his activities as a lawyer running for a judgeship.

[2/] Rule 24, Rules of Disciplinary Enforcement, Ala. Rep. 353-355 So.2d LVIII.

Petitioner has admitted that he approved the design of the campaign card involved in this case, that he was not and never had been a judge, that he realized the cards could mislead people into thinking otherwise, and that he was responsible for the distribution of the cards. He was, therefore, by his own admission, intimately and directly involved in preparing, printing, and publishing a premeditated, objective falsehood about his status and experience.

In Vanasco v. Schwartz, 401 F.Supp. 87 (S.D.N.Y. 1975), affirmed 423 U.S. 1041, 96 S.Ct. 763, 46 L.Ed.2d 630 (1975), the Court held certain sections of the New York Election Law and the New York Fair Campaign Code, adopted under the Election Law, to be unconstitutional. Among the distinctions between that case and the present case are the fact that Vanasco concerned provisions that were specifically designed to regulate political activities, and that were very loosely and confusingly drafted, and that

did not require clear and convincing proof or provide for judicial review. Though none of those aspects of Vanasco are found in this case, the Vanasco Court noted that "calculated falsehoods are of such slight social value that no matter what the context in which they are made, they are not constitutionally protected." 401 F.Supp. at 93. The Vanasco Court further noted that "the deliberate calculated falsehood does not enjoy constitutional protection even when made during the course of a political campaign...." Id. at 95.

In Garrison v. Louisiana, 379 U.S. 64, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964), this Court stated:

> "That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected.

> Calculated falsehood falls into that class of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality....' Chaplinsky v. New Hampshire, 315 U.S. 568, 572 [62 S.Ct. 766, 86 L.Ed. 1031] Hence the knowingly false statement and the false statement made with the reckless disregard of the truth, do not enjoy constitutional protection." 379 U.S. at 75, 85 S.Ct. at 216.

Petitioner cites Brown v. Hartlage, 456 U.S. 45, 71 L.Ed.2d 732, 102 S.Ct. 1523 (1982), in which this Court held that the First Amendment prohibited Kentucky from declaring an election void based upon the victorious candidate's having announced to the voters during his campaign that he intended to serve at a salary less than that fixed by law, in violation of the Kentucky Corrupt Practices Act. This Court found that the action by Kentucky did violate the First Amendment, but the opinion is not very

helpful in the present case, because of the completely different circumstances. However, this Court stated the First Amendment maxim that is most relevant in the present case:

> "Of course, demonstrable falsehoods are not protected by the First Amendment in the same manner as truthful statements." 456 U.S. at 60.

Petitioner Dowling also cites Gertz v. Welch, 418 U.S. 323, 41 L.Ed.2d 789, 94 S.Ct. 2997 (1974). While this case concerns First Amendment rights, it is a defamation case, and the facts giving rise to it have nothing in common with the present case. Nonetheless, this Court's opinion in Gertz does contain a clear and useful statement of First Amendment philosophy. The majority opinion states:

> "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the

> competition of other ideas. But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues. New York Times Co. v. Sullivan, 376 U.S. at 270, 11 L.Ed.2d 686, 95 ALR 2d. 1412. They belong to that category of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.' Chaplinsky v. New Hampshire, 315 U.S. 568, 572, 86 L.Ed. 1031, 62 S.Ct. 766 (1942)." 418 U.S. at 339-40.

Another case referred to by petitioner is Pestrak v. Ohio Elections Commission, 670 F.Supp. 1368 (S.D. Ohio 1987). In that case the Court found unconstitutional certain Ohio statutory provisions prohibiting the dissemination of false statements concerning the candidate and designed to affect an election. The Court found that the Ohio statutory provisions were unconstitutional for two

reasons. First, they did "not sufficiently establish the appropriate standard of clear and convincing proof as required by the Constitution." 670 F.Supp. at 1376. Second, the Ohio statutory provisions provided for "an administrative adjudication which constitutes a prior restraint on constitutionally protected speech," with the provision for a judicial review not sufficient to "afford adequate and timely protection." Id. at 1378 & 1377. As noted by the Supreme Court of Alabama in its opinion in this case, lawyer disciplinary proceedings in Alabama are governed by the clear and convincing proof standard, and are subject to review by the Supreme Court of Alabama.

Another case cited by petitioner is National Association for the Advancement of Colored People v. Button, 371 U.S. 415, 9 L.Ed.2d 405, 83 S.Ct. 328 (1963). In that case a Virginia statute had been construed to include the NAACP's activities, in initiating certain desegregation litigation on

behalf of various black persons, within an expanded definition of improper and proscribed solicitation of legal business. 371 U.S. at 425. This Court held, in essence, that a state statute that had so broad and uncertain a meaning as to allow its application to deprive citizens of First Amendment rights is unconstitutional. This Court stated that it was "enough that a vague and broad statute lends itself to selected enforcement against unpopular causes." 371 U.S. at 435. Neither Temporary DR 2-101(A) nor DR 1-102(A)(4), in the present case, is unconstitutional under the NAACP standard.

The final case cited by petitioner in support of his constitutional attack on the Disciplinary Rules involved in this case is Broadrick v. Oklahoma, 413 U.S. 601, 37 L. Ed.2d 830, 93 S.Ct. 2908 (1973), in which certain provisions of the Oklahoma Merit System and Personnel Administration Act were challenged as being unconstitutional.

The provisions in question proscribed a very broad range of political activities and conduct by state employees in the classified service. This Court upheld the challenged portion of the law, indicating that it was "not so vague" that "men of common intelligence must necessarily guess at its meaning." 413 U.S. at 607.

This Court in Broadrick cited its opinion of the same date in CSC v. Letter Carriers, 413 U.S. 548, 37 L.Ed.2d 796, 93 S.Ct. 2880 (1973), wherein similar provisions in the Federal Hatch Act had been upheld. In Letter Carriers, this Court noted that there were "limitations in the English language with respect to being both specific and manageably brief," and it found that, although the Hatch Act's political activity prohibitions "may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with...." 37 L.Ed.

2d at 816.

In Parker v. Levy, 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974), a First Amendment case, an Army officer challenged the constitutionality of certain provisions of the Uniform Code of Military Justice (UCMJ) under which he had been court-martialed. The provisions in question were challenged on the grounds of vagueness and overbreadth. They, respectively, prohibited "conduct unbecoming an officer or gentleman," and "disorders and neglects to the prejudice of good order and discipline in the armed forces." Though those provisions of the UCMJ were immeasurably more vague and more broad than the provisions of the Alabama Code of Professional Responsibility involved here, this court upheld the constitutional validity of the challenged portions of the UCMJ, and stated:

> "For the reasons which differentiate military society from civilian society, we think Congress is permitted to legislate both with great-

> er breadth and with greater flexibility when prescribing the rules by which the former shall be governed than it is when prescribing rules for the latter. But each of these differentiations relates to how strict a test of vagueness shall be applied in judging a particular criminal statute. None of them suggests that one who has received fair warning of the criminality of his own conduct from the statute in question is nonetheless entitled to attack it because the language would not give similar fair warning with respect to other conduct which might be within its broad and literal ambit. One to whose conduct a statute clearly applies may not successfully challenge it for vagueness." 417 U.S. at 756.

There are as many profound differences between lawyers and laymen as there are between military society and civilian society. Parker, supra, was cited by the District of Columbia Court of Appeals, in Matter of Keiler, 380 A.2d 119 (1977) for the proposition that:

> "The language of a rule setting guidelines for members of the bar need not meet the precise standards of clarity that might be required of rules of conduct for laymen." 380 A.2d at 126.

The present case is not a libel or a slander case. It is not a case concerning a statute or rule or regulation designed to govern political candidates or political campaigns. It is not a case involving any attempt to regulate the free flow of ideas or of information. It is not a case that is at all concerned with issues, beliefs, ideas, accusations, proposals, exhortations, criticisms, fears, threats, demands, or political messages of any sort. Rather, it is a case involving the prohibiting of members of a unique and learned and powerful profession from attempting to mislead other persons or the public in general by calculated, premeditated misrepresentation of objective fact.

In the present case petitioner Dowling

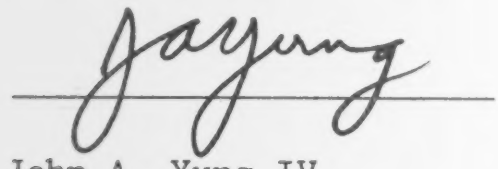
attempted to sell his services to the voters by calculatedly and premeditatedly and falsely holding himself out as a judge. This representation was of an objective fact. Either Dowling was or was not a judge. Either he had been or he had never been a judge. The undisputed facts were that he was not and had never been a judge, though he directly involved himself in the design, production, and distribution of the campaign card that clearly identified him as "Judge Brian Dowling."

If the state has a compelling interest in prohibiting lawyers from making material misrepresentations about themselves or their services when they are trying to get a client or case, then the state has an even more compelling interest in preventing such misrepresentations when the same lawyer is trying to get a judgeship - where he can affect every client and every case that comes before his court.

CONCLUSION

The Alabama State Bar submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

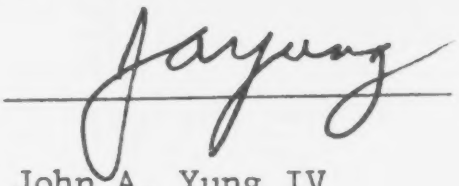


John A. Yung IV
Alabama State Bar
1019 South Perry Street
Montgomery, AL 36104
Telephone: (205) 269-1514

CERTIFICATE OF SERVICE

I, John A. Yung IV, a member of the Bar of the Supreme Court of the United States, do hereby certify that on this the 26th day of April, 1989, I did serve the requisite number of copies of the foregoing brief and argument in opposition to the Petition for the Writ of Certiorari on the attorney for Brian W. Dowling, by

mailing the same to said attorney, first-class postage prepaid, at the address as follows: Mr. Harry Lyon, Post Office Box 21, Pelham, Alabama, 35124.



John A. Yung IV
Alabama State Bar

ADDRESS OF COUNSEL:

1019 South Perry Street
Montgomery, AL 36104
Telephone: (205) 269-1514

APPENDIX

A-1

19454 Filed 8-3-87

IN THE MATTER OF	BEFORE THE DISCIPLINARY BOARD
Brian W. Dowling,	OF THE
AN ATTORNEY AT LAW	ALABAMA STATE BAR
OF THE STATE OF ALABAMA)	CASE NO. 86-352

SUMMONS

To any person authorized by the General Counsel of the Alabama State Bar, pursuant to Rule 12(c), Rules of Disciplinary Enforcement, to effect service:

You are hereby commanded to serve forthwith in person this summons and a copy of petition for disciplinary action, heretofore filed with the Secretary of the Alabama State Bar (copy attached), upon Mr. Brian W. Dowling, 134 South Oates St., Dothan, AL, 36301, (telephone 793-2798), attorney-at-law, also known as same, wherever he may be found.

NOTICE TO RESPONDENT

The formal charges as set forth in a petition for disciplinary action which is attached to this summons is important and you must take immediate action to protect your rights. You are required to serve a copy of a written answer to the petition upon the General Counsel of the Alabama State Bar at State Bar Headquarters, Montgomery, Alabama, and file the original with the Disciplinary Board at State Bar Headquarters. THIS ANSWER MUST BE MAILED OR DELIVERED WITHIN TWENTY-EIGHT (28) DAYS AFTER THIS SUMMONS AND COMPLAINT WERE DELIVERED TO YOU, EXCLUDING THE DAY OF SERVICE OF SUMMONS. IN THE EVENT YOU FAIL TO ANSWER, THE CHARGES SET FORTH IN THE PETITION SHALL BE DEEMED ADMITTED. The site of the hearing on these charges shall be determined by the Chairman of the Disciplinary Board unless you request in your first defensive pleading that the hearing be held in your home county.

Reginald T. Hamner

SECRETARY
ALABAMA STATE BAR

WITNESS my hand, this the 31st day of July, 19 87.

This summons is issued in connection with a confidential proceedings under the Rules of Disciplinary Enforcement of the Supreme Court of Alabama and it is regarded as contempt of the Disciplinary Board enforceable by a court or grounds for discipline of an attorney for a person subpoenaed to breach in any way the confidentiality of the proceedings.

FORM B-1 (ref: Rules of Disciplinary Board, Sec. 4-II-a)

AUG 1987
Office of General Counsel

FILED IN OFFICE

JUL 31 1987

BEFORE THE DISCIPLINARY BOARD OF THE

ALABAMA STATE BAR

IN THE MATTER OF)

BRIAN W. DOWLING,) CASE NO. ASB 86-352

AN ATTORNEY AT LAW)

Brian W. Dowling having demanded the filing of formal charges in this matter, under Rule 8(b), Rules of Disciplinary Enforcement of the Alabama State Bar, accordingly, comes now the Grievance Committee of the Houston County Bar Association, by and through its Chairman, and avers that it has probable cause for believing, and does believe and allege that Brian W. Dowling, (hereinafter, "respondent attorney"), has been guilty of violating or failing to comply with certain provisions of the Code of Professional Responsibility of the Alabama State Bar, in that:

COMPLAINT ONE [86-352]

Charge I

[Violation of Temporary DR 2-101(A)]

1. At all times pertinent, the respondent attorney was licensed to practice law in the State of Alabama.

2. The respondent attorney was a candidate for Houston County, Alabama District Judge in the 1986 election.

3. As part of his campaign, the respondent attorney had printed, and distributed, a certain campaign card, a copy of which, front and back, is attached hereto and incorporated herein by this reference as Exhibit "A".

4. Despite the wording on this campaign card, the respondent attorney was not, and never had been, a District Judge in Houston County, or any other county in the State of Alabama, and had not been a judge on any other court of the judicial system of the State of Alabama, or of any other state.

5. In doing the above-described acts, the respondent attorney made or caused to be made a false or misleading communication about himself, containing a material misrepresentation of fact, or omitting a fact necessary to make the statement considered as a whole not materially

misleading, and was, thereby, guilty of violating or failing to comply with Temporary DR 2-101(A), said Rule providing:

> "A lawyer shall not make or cause to be made a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:
>
> (A) Contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading."

Charge II

[Violation of DR 1-102(A)(4)]

1. For Charge II, the Grievance Committee adopts all of the allegations of paragraphs 1 through 4 of Charge I, and further alleges:

2. In doing the above-described acts, the respondent attorney engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation, and was, thereby, guilty of violating or failing to comply with DR 1-102(A)(4), said Rule providing:

> "(A) A lawyer shall not:
>
> * * *
>
> (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, nor be guilty of willful misconduct."

Edward Jackson

Edward Jackson, Chairman
Grievance Committee of the
Houston County Bar Association

CERTIFICATE OF FILING

I hereby certify that the foregoing disciplinary charges were filed in the office of the Secretary of the Alabama State Bar this the 31st day of July, 1987.

Reginald T. Hamner

Reginald T. Hamner
Secretary
Alabama State Bar

★★★★★★★★★★★★★★★★★★★★

JUDGE BRIAN

DOWLING

FOR
DISTRICT JUDGE
HOUSTON COUNTY

Brian Dowling - Dothan, Alabama - 793-2798

Justice For All

- Dothan native, 38 years of age
- 1970 U.S. Army Newsman
- 1975 Attorney General's Office
- 1976 Entered Law Practice in Dothan
- Houston County Bar Association
- 1983 City Attorney & Prosecutor for Dothan
- Graduated top 10% of Law School
- Experienced in every type of Alabama Court (Primarily District Court)
- Will Protect Victims of Crime
- Family: Married to the former Beth Walker (a teacher of hearing impaired children with Dothan City Schools)

JUNE 3: You MUST vote Democrat or Republican
NOVEMBER 4: You may vote independently for any candidate

EXHIBIT
"A"

BEFORE THE DISCIPLINARY BOARD OF THE

ALABAMA STATE BAR

IN THE MATTER OF	)	
BRIAN W. DOWLING,	)	CASE NO. ASB 86-352
AN ATTORNEY AT LAW	)	

FINDINGS
AND
ORDER FOR PUBLIC CENSURE

This matter having been heard this date, as scheduled, and the Disciplinary Board having considered all matters presented by the Bar and by the respondent attorney, the Disciplinary Board finds the facts to be as alleged in the disciplinary complaint, and finds the respondent attorney, Brian W. Dowling, guilty of Charge I and Charge II, and it is

ORDERED that the respondent attorney's discipline in this matter be and it is hereby set at a Public Censure.

THIS the 16th day of October, 1987.

Walter P. Crownover, Chairman
Disciplinary Board, Panel II
Alabama State Bar
P. O. Box 2507
Tuscaloosa, AL 35401

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Order was served upon the respondent attorney, Mr. Brian W. Dowling, 134 South Oates Street, Dothan, AL, 36301, by United States mail, postage prepaid, this the 16th day of October, 1987.

Walter P. Crownover, Chairman
Disciplinary Board, Panel II
Alabama State Bar